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No. 91-1877

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE COLORADO DEPARTMENT OF HIGHWAYS and
THE COLORADO DIVISION OF HIGHWAYS,
PHILLIP PACHECO, *et al.*,
Petitioners,

v.

YVONNE DEFOOR, FRANK BOWEN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

---

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to consider this petition for writ of certiorari under 28 U.S.C. § 1257 when no federal issue was finally decided?

2. Assuming jurisdiction, was the Colorado Supreme Court correct in any event in reinstating respondents' § 1983 claims given the specific, nonconclusory allegations of the petitioners' deliberate disregard of the respondents' constitutional rights?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
RELATED CASE	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. THIS COURT SHOULD DECLINE JURISDICTION BECAUSE THE COLORADO SUPREME COURT'S DECISION WAS NOT FINAL AS TO THE FEDERAL ISSUE BUT INSTEAD SIMPLY REMANDED THE CASE FOR FURTHER HEARINGS IN ORDER PROPERLY TO POSTURE THE FEDERAL ISSUE	4
II. ASSUMING THIS COURT HAS JURISDICTION, THE COLORADO SUPREME COURT'S OPINION IS CONSONANT WITH THIS COURT'S PRECEDENTS CONSTRUING § 1983, INCLUDING *COLLINS v. CITY OF HARKER HEIGHTS, TEXAS*	8
A. The Acts by the Individual Defendants Were Under Color of State Law, Were Arbitrary and Shock the Conscience	8
B. The Allegations in the Complaint Are Properly Directed Against the Individual Defendants	12
CONCLUSION	13

TABLE OF AUTHORITIES

CASES

	Page
Anderson v. Creighton, 483 U.S. 635 (1987)	5, 10
Baker v. McCollan, 443 U.S. 137 (1979)	5, 8
Boretti v. Wiscomb, 930 F.2d 1150 (6th Cir. 1991)	7
Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988)	6
Collins v. City of Harker Heights, Texas, 503 U.S. ——, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)	iii, 8, 9, 11, 12
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	4
Daniels v. Williams, 474 U.S. 327 (1986)	5, 8
DeShaney v. Winnebago County Dep't Of Social Services, 489 U.S. 189 (1989)	11
Elliot v. Thomas, 937 F.2d 338 (7th Cir. 1991)	7
Flynt v. Ohio, 451 U.S. 619 (1981)	4
Hafer v. Melo, —— U.S. ——, 112 S.Ct. 358 (1991)	10
Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978)	12
Parratt v. Taylor, 451 U.S. 527 (1981)	5
Paul v. Davis, 424 U.S. 693 (1976)	11
Sawyer v. County of Creek, 908 F.2d 663 (10th Cir. 1990)	7
Seigert v. Gilley, 500 U.S. ——, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991)	7
Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981)	11
State v. DeFoor, 824 F.2d 783 (Colo. 1992)	1, 4
Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989)	5
Wyatt v. Cole, 504 U.S. ——, 112 S.Ct. 1822, 118 L.Ed.2d 504 (1992)	12

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The decision of the Colorado Supreme Court is reported as *State v. DeFoor*, 824 P.2d 783 (1992).

JURISDICTION

This Court lacks jurisdiction to entertain this petition for certiorari because the decision of the Colorado Supreme Court was not a final judgment of a federal issue within the meaning of 28 U.S.C. § 1257. *See* Reasons For Denying The Writ, *infra*.

RELATED CASE

On May 26, 1992, respondents, in No. 91-1922, petitioned for writ of certiorari relative to the Colorado Supreme Court's decision in *State v. DeFoor* to uphold the $400,000 limitation of damages per occurrence against the families of the nine travellers killed and the 19 travellers injured by the actions of the petitioners here.

STATEMENT OF THE CASE

The catastrophic event generating this case occurred on a mountain switchback highway on Berthoud Pass, Colorado, on August 10, 1987. An employee of the Colorado Department of Highways, using a front-end loader in the performance of his duties and within the scope of his employment, pushed a seven-ton boulder over a precipice. The rock tumbled 750 feet down a mountainside onto United States Highway 40 on the west side of the Pass and ripped into and crushed a tour bus. The consequences were fatal: nine tourists were killed. Nineteen others were severely injured. The petitioners' description of this catastrophe as an ordinary roadway accident is shamefully disingenuous.

Rock removal operations on nearby Loveland Pass in the weeks previous to the catastrophe also resulted in rocks tumbling onto the highway. Yet, no steps were taken either to modify the rock removal operations or to stop traffic or otherwise to warn travellers crossing the Continental Divide. The Colorado Department of Highways and its employees continued to displace rocks despite the knowledge that rocks so moved would overrun the public highway below.

Respondents have alleged that the state employees acted under the color of the customs and policies of the Colorado Department of Highways with regard to rock removal operations, which customs also included unreasonable work-production schedules. It is alleged that the conduct of the state employees under color of state cus-

tom and policy was wilful, wanton, grossly negligent, reckless and in deliberate disregard of human life and health.

On January 7, 1988, the State of Colorado filed an interpleader action in Denver District Court, naming as defendants the respondents herein and seeking to deposit a total sum of $400,000 into the registry of the court as the full extent of the State's obligation for the catastrophic deaths and injuries suffered by the 28 tourists resulting from the State's rock-clearing operations. Respondents counterclaimed against the State, contending, among other things, that the $400,000 aggregate—*i.e.*, the per occurrence maximum damages amount provided by § 24-10-114(1)(b), 10A C.R.S. (1988)—violated their constitutional rights to equal protection of the laws and to substantive due process of law. The Colorado Supreme Court ultimately concluded that the families of the nine decedents and the 19 injured survivors are entitled to recover no more than a total of $400,000 in damages under the state's governmental immunity act, an amount which will not even cover the medical bills of one of the victims on Berthoud Pass. *See* Related Case, No. 91-1922.

Respondents also filed third-party civil rights claims against the individual state employees under 42 U.S.C. § 1983. The petitioners herein moved for summary judgment, asserting that the factual allegations in the complaint did not state a claim for relief under § 1983 and that the individual state employees were entitled to qualified immunity from suit. In a three-sentence ruling, the trial court granted the motion, dismissing the respondents' § 1983 claims. However, the trial court made *no* findings of fact specific to those claims. No factual discovery whatsoever transpired. Moreover, the trial court did not articulate the reasons for the dismissal of the respondents' claims, but merely concluded that the respondents did not state a claim under § 1983.

On appeal, the Colorado Supreme Court concluded that the trial court prematurely dismissed the § 1983 claims, remanding the claims for further hearings. The Colorado Supreme Court apparently intended to give the victims a reasonable opportunity to be heard on their § 1983 claims.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DECLINE JURISDICTION BECAUSE THE COLORADO SUPREME COURT'S DECISION WAS NOT FINAL AS TO THE FEDERAL ISSUE BUT INSTEAD SIMPLY REMANDED THE CASE FOR FURTHER HEARINGS IN ORDER PROPERLY TO POSTURE THE FEDERAL ISSUE.

Under 28 U.S.C. § 1257, this "Court's jurisdiction to review a state-court decision is generally limited to a final judgment rendered by the highest court of the State in which decision may be had." *Flynt v. Ohio*, 451 U.S. 619, 620 (1981). No matter how petitioners attempt to frame a federal issue for review by this Court, the Colorado Supreme Court did not finally determine any federal issue. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

The problem turns on correctly identifying the federal issue. To make that identification, the Colorado Supreme Court's three-paragraph disposition of the § 1983 claims in *State v. DeFoor* must be properly examined. In the first paragraph, the Court stated:

> Finally, claimants contend that the district court erred in dismissing their § 1983 claims against individual defendants for failure to state claims sufficient to expose the individual defendants to civil rights liability.[1] We agree.

---

[1] "Claimants brought third-party actions under § 1983 against various individuals, including the Executive Director of the Department of Highways, the Chief Engineer, and highway maintenance supervisors and workers." [Note by the Colorado Supreme Court.]

824 P.2d at 793. In this first paragraph, the Colorado Supreme Court agreed with the respondents' contention that the trial court committed error. The trial court, it must be emphasized, made no specific findings of fact or rulings of law concerning § 1983 issues.

In the second paragraph, the Colorado Supreme Court stated:

> In order to state a claim for relief under § 1983, a plaintiff must allege that a defendant acted under color of state law and that the defendant's action deprived the plaintiff of a right secured by the federal constitution or federal laws. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). Courts must then determine whether such rights have been violated by applying substantive federal-law that defines the requisite state of mind and the other requirements for pleading a civil rights action. *Daniels v. Williams*, 474 U.S. 327, 330 (1985); *Baker v. McCollan*, 443 U.S. 137, 140 (1979); Sheldon Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 3.02, 141 (3d ed. 1991). Finally, the defendant can assert qualified immunity defenses to defeat a § 1983 claim. *Hafer v. Melo*, —— U.S. ——, 112 S.Ct. 358 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989); *Anderson v. Creighton*, 483 U.S. 635 (1987).

This second paragraph essentially instructs trial courts what factors to look for when considering § 1983 claims and defenses to them. The Colorado Supreme Court reiterated the fundamentals of a claim for relief under § 1983, correctly highlighting the current substantive federal law defining the requisite states of mind of the defendants. The Colorado Supreme Court concluded the second paragraph by reminding the trial courts of the general availability to defendants of the defense of qualified immunity to defeat a § 1983 claim.

The third and final paragraph of the Colorado Supreme Court's opinion is as follows:

> Noting that the parties "against whom summary judgment is sought [are] entitled to the benefit of all favorable inferences that may be drawn from the facts," *Churchey v. Adolph Coors Company*, 759 P.2d 1336, 1339-40 (Colo. 1988) (citations omitted), we are not convinced that there was no genuine issue of material fact with respect to claimants' § 1983 allegations. We thus reinstate and remand the § 1983 claims for further hearings.

In *Churchey*, the Colorado Supreme Court emulated federal practice in considering the propriety of summary judgments, citing 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2716 (2d ed. 1983) ("'reviewing court . . . cannot decide disputed issues of material fact'"); and Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984). 759 P.2d at 1340.

Taken together, the three paragraphs can only be construed to mean that the Colorado Supreme Court concluded that the trial court's dismissal of the § 1983 claims was premature. The result was that the federal issues were not properly postured for review.

Because the Colorado Supreme Court was not convinced that no genuine issue of fact lurked in the matter on review, further hearings, though not necessarily a trial, were ordered. Hence, upon remand the trial court must hold further hearings on several crucial matters, including whether any discovery is necessary to crystalize the issue of immunity given that the character of the individual defendants' acts as discretionary or ministerial is disputed, whether any facts relevant to the issue of the character of the state's customs and policies are in the exclusive control of the defendants, and whether amendments to the complaint are necessary to cure any defect arising from changes in substantive federal law since the events on Berthoud Pass. The respondents do have the right, with leave of the court (which, of course, must be freely given), to amend the pleadings. Absent

these further proceedings by the trial court, the matter is not ripe for this Court's review.

For example, the trial court may again entertain a motion to dismiss the claims based on qualified immunity. However, a genuine dispute exists as to whether the acts by the state employees on Berthoud Pass were discretionary or ministerial such as to raise the issue of whether qualified immunity is available at all. *Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991) (because it was "disputed whether the functions which [the] defendant . . . failed to perform [were] discretionary or ministerial," defendant's motion for summary judgment "on the basis of qualified immunity" should not have been granted).

The trial court may also determine on remand whether the existing allegations, which includes the allegation that the state employees "*knew, or should have known or expected, that there were travellers on U.S. Highway 40, below, and that the travellers were within the range of the dangerous acts and omissions of causing the boulders to descend the embankment*," are "specific, nonconclusory factual allegations" establishing, among other things, the requisite state of mind according to substantive federal law. *See Seigert v. Gilley*, 500 U.S. ——, 111 S.Ct. 1789, 114 L.Ed.2d 277, 289 (1991) (Kennedy, J., concurring); *Elliot v. Thomas*, 937 F.2d 338, 344 (7th Cir. 1991) ("When intent is one of the substantive elements of a constitutional wrong, the plaintiff is entiled to an adequate opportunity to establish that the defendant acted with the proscribed intent."), *cert. denied*, —— U.S. ——, 112 S.Ct. 973, 117 L.Ed.2d 138 (1992); *Sawyer v. County of Creek*, 908 F.2d 663, 665-66 (10th Cir. 1990) ("Following a defendant's motion to dismiss, the district judge should permit the plaintiff to come forward with any additional allegations showing that the defendant violated clearly established law."). The trial court may then decide, among other things, whether the customs,

policies, and conduct of the petitioners were deliberately indifferent, arbitrary, and shocking to the conscience, as well as whether any amendment to the complaint may be necessary. Thus, the Colorado Supreme Court properly remanded the respondents' civil rights claims for further hearings. The results will be open to further review by the Colorado Supreme Court and, if necessary, by this Court. For these reasons alone, this petition for writ of certiorari should be denied.

II. ASSUMING THIS COURT HAS JURISDICTION, THE COLORADO SUPREME COURT'S OPINION IS CONSONANT WITH THIS COURT'S PRECEDENTS CONSTRUING § 1983, INCLUDING *COLLINS v. CITY OF HARKER HEIGHTS, TEXAS.*

Contrary to the petitioners' assertion, the Colorado Supreme Court's opinion does not and will not elevate an ordinary tort claim into a case of constitutional dimension. The court's decision to remand for further proceedings on the issues of material facts is not only consonant with *Daniels* and *Baker*, precedents upon which the Colorado Supreme Court relied, but it also satisfies any standards or requirements established in *Harker Heights*, 503 U.S. ——, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), a case decided by this Court after the Colorado Supreme Court's decision.

A. The Acts by the Individual Defendants Were Under Color of State Law, Were Arbitrary and Shock the Conscience.

The allegations in the complaint are *not* based on an ordinary roadway accident. They are not predicated on the "mere lack of due care by a state official," nor solely on the fact that state employees merely "fail[ed] to measure up to the conduct of a reasonable person." *Daniels*, 474 U.S. at 331-32.

Much to the contrary, the underlying complaint, as even the petitioners cite, specifically alleges that the in-

dividual defendants deliberately, recklessly, wilfully, wantonly, and with deliberate indifference to human life and safety executed "the following customs and administered the following policies" of the state and its agencies:

> —Pushing large rocks . . . over embankments and slopes, without stopping or warning public traffic lawfully traveling on highways or roadways below;.
>
> —Failing to post adequate numbers of flag persons and warning signs so as to stop traffic when ditch-clearing operations are performed on mountainous terrain;
>
> —Training, instructing, supervising, and guiding employees of the State of Colorado, the Colorado Department of Highways and or Colorado Division of Highways to perform ditch-clearing operations in mountainous terrain in a highly dangerous manner in grossly negligent, reckless, and deliberate disregard of the public safety;
>
> —Emphasizing excessive work-production standards by the State of Colorado, the Colorado Department of Highways and/or Colorado Division of Highways employees with inadequate regard for the public safety; [and]
>
> —Requiring maintenance workers to forego known and relatively simple procedures to break dangerous and potentially lethal rocks into smaller, safer, and more manageable sizes.

These allegations stand in stark contrast to the allegations by the claimant in *Harker Heights*, 117 L.Ed.2d at 273 ("A fair reading of petitioner's complaint does not charge the city with a wilful violation of [decedent's] rights.").

More importantly, there are other allegations which the petitioners' fail to cite. As previously noted, the complaint alleges that the individual defendants "*knew, or should have known or expected . . . , that the travellers were within the range of the [foregoing] dangerous acts. . . .*" (emphasis added). In addition, contrary to the

petitioners' assertion that nowhere "are specific actions and behaviors of individual employees particularized in the fashion demanded by *Anderson v. Creighton*," Petition at 10, the complaint expressly incorporates all of the foregoing factual allegations and more as to each of the named individual defendants. *See Hafer v. Melo*, —— U.S. ——, 112 S.Ct. 358, 116 L.Ed.2d 301, 308 (1991) ("state officials sued in their individual capacities are 'persons' for purposes of § 1983").

In the light of the facts of this case, the petitioners' pallid argument that the individual defendants here merely acted "negligently" is misleading, conclusory and premature. Respondents' complaint alleges that the individual defendants acted "within the course and scope of their employment." That is, the harm to the travellers occurred precisely because employment duties were carried out *as directed and expected*. Massive rocks were deliberately pushed off the mountainside without precaution according to the customs and policies of the Colorado Department of Highways. The rocks were not accidentally nudged off the mountain. Rather, the harms occurred because the defendants performed their duties exactly as they were required to do by Colorado Department of Highways' policies and customs, not because they carried out their duties carelessly. There is a vast difference between, on the one hand, an unconscionable, reckless, wanton policy and conduct deliberately indifferent to human life and safety and, on the other hand, conduct which is simply careless execution of an otherwise constitutionally unobjectionable policy.

The respondents' claims do not arise from a one-time simple act of negligence, but arise directly from the customs and policies of the Colorado Department of Highways. These customs included rock removal operations at a deliberately frantic pace and under such dangerous circumstances as to reflect utter disregard for the safety of the public known to be travelling below. That serious

harm would result from this practice was patently obvious. The custom of deliberately pushing large boulders directly over busy highways, with no warning whatsoever to the travelling public, is arbitrary and conscience-shocking. Because of these customs, the claims here cannot be reduced to the case of a simple negligent act by a state employee which occurred during otherwise reasonable rock removal. Moreover, unlike the claim made in *Harker Heights*, the complaint here cannot be reduced to the simple failure to train governmental employees.

For these reasons, the reinstatement of the § 1983 claims by the Colorado Supreme Court does not, and will not, make the constitutional guarantee of due process of law " 'a font of tort law to be superimposed upon' " the state's tort system, contrary to petitioners' assertions. Petition at 5, quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976).

Finally, petitioners advance the preposterous argument that if a private entity, such as a private road building contractor, can perform the same acts performed by the Colorado Department of Highways' employees, those employees cannot be subject to a § 1983 claim. Most assuredly, private persons can deny others their interests in life, liberty or property. *See DeShaney v. Winnebago County Dept. Of Social Services*, 489 U.S. 189 (1989). That does not mean, however, that when the denial results from governmental employees acting under color of law that it is beyond the reach of § 1983.[2] The petitioners' assertion that "no cognizable civil rights claim exists"

[2] In *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981), for example, a police officer who struck a picture-taking but otherwise peaceful tourist with a nightstick was deemed to have violated the tourist's constitutional rights in an action under § 1983. *Id.* at 265. Applying the petitioners' argument, if the defendant in *Shillingford* had merely pointed out that private persons also are perfectly capable of striking tourists with nightsticks, the suit thereby would have been reclassified as a simple tort suit and not a § 1983 action.

because "only the employer of these alleged tortfeasors distinguishes this from other tort actions," is therefore absurd.

B. The Allegations in the Complaint Are Properly Directed Against the Individual Defendants.

Petitioners' assert that the foregoing allegations would be relevant only if "directed at a municipality" and are thus "irrelevant" here as to the state employees. Petition at 8-9 (citing *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978)). This argument is an exercise in misdirection. That municipalities are "persons" and therefore liable under § 1983, *Monell*, 436 U.S. at 690, *Harker Heights*, 503 U.S. ——, 117 L.Ed.2d at 270, does not mean that the scope of § 1983 liability of individual state actors is thereby diminished. As this Court recently held, the primary "purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. ——, 112 S.Ct. ——, 118 L.Ed.2d 504, 511 (1992).

Monell's inclusion of local government bodies within the definition of "person" in § 1983 was an expansion of liability, not a contraction. Indeed, *Monell* holds that "local governments, *like every other § 1983 'person,'* by the very terms of the statute, may be sued for constitutional deprivations visited *pursuant to governmental 'custom'*. . . ." 436 U.S. at 690-91 (emphasis added). Here, the individual state employees, paradigmatic § 1983 "persons," visited the harms on the travellers on Berthoud Pass pursuant to Colorado Department of Highways' customs and policies. Under *Monell* and subsequent case law, therefore, the allegations here are properly directed against the individual defendants.

CONCLUSION

This case is not ripe for review by this Court. The Colorado Supreme Court remanded the case to the trial court for further hearings in order properly to posture the important federal issues for further review, if necessary. Further hearings by the trial court, far from mooting any federal issues, in fact will serve to crystalize those issues. Moreover, because the allegations by the respondents are consonant with this Court's precedents construing § 1983, this petition for writ of certiorari should be denied.

Dated this 16th day of October 1992.

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